DIAGEO

1301 K Street, NW
Suite I 000 East Tower
Washington, DC 20005

Tel 202-715-1105
Fax 202-715-1114

January 25, 2008

Director, Regulations and Rulings Division
Alcohol and Tobacco Tax and Trade Bureau
Box 14412
Washington DC 20044-4412

Re: Notice 73 – Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages

Dear Director:

Attached are supplemental comments to Diageo North Americas's comment on Notice 73, which are referenced on p. 12 of the Diageo comment.

Please let us know f you have any questions.

Sincerely,

Guy L. Smith
Executive Vice President

Gary Zizka
Vice President, Public Policy

Attachment

Supplemental Comments to Diageo Comment on

Notice 73 – Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages

SIDLEY AUSTIN LLP
SIDLEY

SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
(202) 736 8000
(202) 736 8711 FAX

dtroy@sidley.com
(202) 736-8304

BEIJING GENEVA SAN FRANCISCO
BRUSSELS HONG KONG SHANGHAI
CHICAGO LONDON SINGAPORE
DALLAS LOS ANGELES TOKYO
FRANKFURT NEW YORK WASHINGTON, DC

FOUNDED 1866

March 28, 2006

Mr. Francis W. Foote
Director, Regulations & Procedures Division
Alcohol & Tobacco Tax & Trade Bureau
Box 14412
Washington, D.C. 20014

Re: First Amendment Implications of TTB's Notice 41 Regarding Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages

Dear Mr. Foote:

Enclosed please find an addendum to the comments previously submitted by Diageo plc, Diageo North America and DIAGEO-Guinness U.S.A., Inc., on Alcohol & Tobacco Tax & Trade Bureau ("TTB") Notice 41, Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages, 70 Fed. Reg. 22274 (Apr. 29, 2005). This addendum focuses on the First Amendment implications of TTB's failure to permit manufacturers of alcoholic beverages to include certain truthful, nonmisleading information on product labels. Diageo appreciates the opportunity to provide its comments. Please do not hesitate to call me if you have any questions concerning our comment.

Sincerely,

Daniel E. Troy

DET:dlf

UNDER THE FIRST AMENDMENT, ALCOHOLIC BEVERAGE LABELS MUST BE PERMITTED TO INCLUDE SERVING INFORMATION

Supplemental Comments of Diageo plc, Diageo North America and DIAGEO-GUINNESS U.S.A., Inc. on TTB Notice 41, *Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages*, 70 Fed. Reg. 22274 (April 29, 2005)

Daniel E. Troy
Eric A. Shumsky
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Under federal law, milk cartons, soft drink bottles, and most other beverages sold in the American marketplace *must* include nutritional information, including such basic data as calories, fat, sodium, and carbohydrates.[1] This information is contained in the familiar "Nutrition facts" boxes that are printed on most food packages. Yet, anomalously and without any good justification, this same information *may not*[2] be included on the labels of alcoholic beverages. The Alcohol & Tobacco Tax & Trade Bureau ("TTB") will not issue a certificate of label approval (which is required under the Federal Alcohol Administration Act ("FAAA") before alcohol may be bottled or removed from customs custody[3]) if the proposed label includes such "Serving Facts."[4]

This basic nutritional information is truthful and nonmisleading. As such, it is absolutely clear that suppliers of alcoholic beverages have a First Amendment right to include it on product labels. At a minimum, TTB cannot constitutionally prohibit suppliers from including the following items on product labels: serving size; servings per container; and the calories, fat, carbohydrates, protein, and volume of pure alcohol contained in one serving. TTB should recognize this constitutional mandate through the rulemaking process that it has initiated, and declare that it is permissible to include this information on product labels. In the meantime, TTB cannot constitutionally forbid the inclusion of this information on product labels while it

---

[1] *See generally, e.g.*, 21 C.F.R. pts. 101 ("Food labeling"); *id.* pt. 131 ("Milk and cream"); *id.* pt. 146 ("Canned fruit juices"); *id.* pt. 156 ("Vegetable juices"); *id.* § 165.110 ("Bottled water").

[2] This prohibition is subject to certain limited exceptions, discussed below (*infra* at 16) that demonstrate the illogic of the prohibition, and thereby help demonstrate its unconstitutionality.

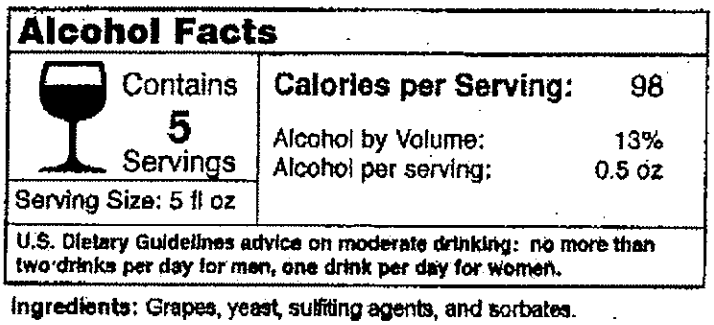
[3] *See* 27 U.S.C. § 205(e); 27 C.F.R. §§ 4.40, 4.50 (wine); *id.* §§ 5.51, 5.55 (distilled spirits); *id.* §§ 7.31, 7.41 (malt beverages).

[4] Labeling & Advertising of Wines, Distilled Spirits and Malt Beverages; Request for Public Comment, 70 Fed. Reg. 22,274, 22,282 (Apr. 29, 2005) ("Pending the completion of rulemaking proceedings, TTB does not intend to issue certificates of label approval bearing the optional "Serving Facts" panel.").

completes its (undoubtedly lengthy) rulemaking process. It should announce that it therefore will exercise its enforcement discretion not to reject proposed labels that include such information.

I. BACKGROUND ON TTB'S REGULATION OF SERVING FACTS ON ALCOHOL BEVERAGE LABELS.

On December 16, 2003, the Center for Science in the Public Interest and the National Consumers League (joined by other entities and individuals) filed a petition requesting TTB to *require* certain information on the labels of alcoholic beverages, as reflected in the following sample label[5]:

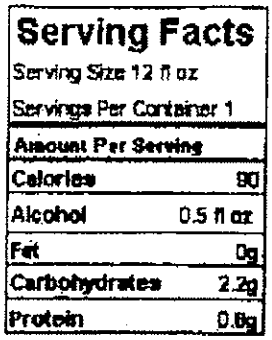


(Fig. 1)

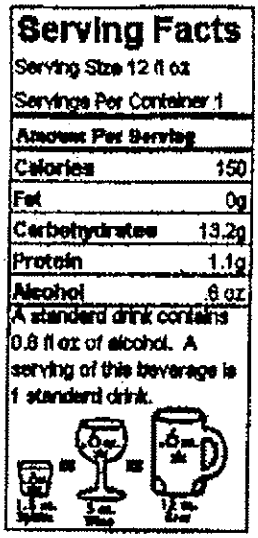
Subsequently, members of the alcoholic beverage industry asked TTB to *permit* the inclusion of such information on alcoholic beverage labels. In response to these inquiries, in 2004 TTB sought comments on the following sample labels[6]:

[5] 70 Fed. Reg. 22,279.

[6] *Id.* at 22,281-82.



(Fig. 2)



(Fig. 3)

At the same time, TTB announced that it intended to permit certain serving facts to be placed on alcoholic beverage labels—specifically, serving size in fluid ounces, servings per container, and the per-serving quantity of calories, fat, carbohydrates, protein, and ounces of ethyl alcohol.[7]

However, in response to comments arguing that this issue should be addressed through the notice-and-comment process, and that the serving-facts panel might be misleading, TTB issued an Advance Notice of Proposed Rulemaking ("ANPR").[8] It "solicit[ed] public comment on a wide range of alcohol beverage labeling and advertising issues to help the agency determine what regulatory changes in alcohol beverage labeling and advertising requirements, if any, TTB should propose in future rulemakings."[9] While the rulemaking process is pending, TTB announced, it will not approve any label that includes such information.[10] As matters stand,

---

[7] *See* TTB, *Serving Facts Information on Alcohol Beverages*, http://www.ttb.gov/press/fy04press/081004servefacts.pdf (Aug. 5, 2004); 70 Fed. Reg. at 22,281.

[8] 70 Fed. Reg. at 22,282.

[9] *Id.* at 22,275.

[10] *Id.* at 22,282

therefore, and for the foreseeable future, alcohol beverage suppliers are unable to include this simple, factual, truthful, nonmisleading information on labels. The First Amendment does not countenance this form of information suppression.

II. ALCOHOL BEVERAGE SUPPLIERS HAVE A FIRST AMENDMENT RIGHT TO INCLUDE SERVING FACTS ON PRODUCT LABELS.

In a series of cases spanning the past decade, the Supreme Court repeatedly has struck down government efforts to suppress commercial speech—including, of particular pertinence here, speech that appears on product labeling.[11] Both the D.C. Circuit and the United States District Court for the District of Columbia have done likewise.[12] Here too, TTB's refusal to permit the inclusion of serving facts on beverage alcohol[13] labels runs afoul of First Amendment principles. Under the four-part test set forth by the Supreme Court in *Central Hudson*, a court considering restrictions on commercial speech

> must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[14]

Here, the policy founders on each of the four requirements.[15]

---

[11] *E.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *see also Lorillard Tobacco Co. b. Reilly*, 533 U.S. 525 (2001); *Greater New Orleans Board. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

[12] *See, e.g., Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999); *Whitaker v. Thompson*, 248 F. Supp. 2d 1, 9-10 (D.D.C. 2002).

[13] The term "beverage alcohol" refers to distilled beverages such as whiskey, scotch, gin and vodka. The separate term "alcoholic beverages" refers collectively to beer, wine, and beverage alcohol.

[14] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

[15] The following analysis assumes that TTB's speech restrictions are governed by the comparatively deferential commercial-speech doctrine, because the restrictions so clearly fail

A. THE SPEECH IS TRUTHFUL AND NOT MISLEADING.

1. The speech at issue here falls squarely within the protections of the First Amendment, for it is self-evidently truthful and nonmisleading. The information that is the primary focus of TTB's ANPR is simple nutritional information: serving size; the number of servings in the container; the amount of calories, fat, carbohydrates and protein in a serving; and the volume of ethyl alcohol per serving. (In addition to these pieces of information—which appear on the sample labels in TTB's ANPR, and also on a sample label contained in comments submitted by a manufacturer[16]—other possible items that might be included are product ingredients, and information about what constitutes a "standard drink." Those items are not considered here.) It cannot seriously be argued that these pieces of basic, factual information are untruthful. There exists a method for calculating calories, fat, carbohydrates, etc., which is widely used in deriving the similar information that is included on the labels of other beverages. There is no suggestion that that information is not truthful. Similarly, the volume of ethyl alcohol contained in one serving is derived from a basic mathematical calculation—the volume of a serving size multiplied by the percentage of alcohol by volume.

---

even that test. However, at least four Justices have indicated that this speech may be subject to scrutiny approaching normal First Amendment protections. *See 44 Liquormart v. State of Rhode Island*, 517 U.S. 484, 501 (1996) ("[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process [between sellers and purchasers], there is far less reason to depart from the rigorous review that the First Amendment generally demands.") (opinion of Stevens, Kennedy and Ginsburg, JJ.); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572, 576-77 (2001) (Thomas, J., concurring in part and concurring in the judgment). Indeed, this speech seems not to fall within the typical definition of commercial speech—*i.e.*, "speech which does 'no more than propose a commercial transaction,'" *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 758 (1976); *see generally* Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 Yale J. Reg. 85, 123 (1999).

[16] *See* Letter of Sept. 26, 2005 from Guy L. Smith and Carolyn L. Panzer, Diageo, to Francis W. Foote, Director, Regulations & Procedures Division, Alcohol & Tobacco Tax & Trade Bureau.

Nor is this serving information in any way misleading. On the contrary, each of these pieces of information is purely factual, and would assist consumers by providing them with useful information about the contents of alcoholic beverages. For the same reason, it would also facilitate competition among manufacturers on the basis of these product attributes. Importantly, this is the conclusion of the FTC staff, as set forth in comments to TTB supporting the use of such labels.[17] The staff reasoned that "[b]ecause alcohol and nutrients in beverage alcohol can affect health, information about these ingredients on beverage labels may help consumers make better-informed decisions."[18] Just as the inclusion of such information on food labels has "assisted consumers in making better-informed choices among competing foods,"[19] "FTC staff believes that disclosure of alcohol and nutrient content information on beverage alcohol labels could have similar beneficial effects on consumers and competition."[20]

Indeed, TTB has itself previously *required* that some of this same information (specifically, serving size, and the calories, carbohydrates, protein and fat in a serving) be included on certain alcoholic beverages, on the theory that a failure to do so would cause nutritional claims concerning calories and carbohydrates to be misleading.[21] That is, TTB itself has recognized that such information is not only nonmisleading, but is in fact clarifying, and may provide necessary context for nutritional claims. Under these circumstances, any contrary

---

[17] *See* Comments of the Staff of the Bureau of Consumer Protection, the Bureau of Economics, and the Office of Policy Planning of the Federal Trade Commission, at 2 (Sept. 26, 2005).

[18] *Id.* at 4.

[19] *Id.*

[20] *Id.* at 5.

[21] *See* Department of the Treasury, Alcohol & Tobacco Tax & Trade Bureau, TTB Ruling 2004-1, at 7 (Apr. 7, 2004) ("caloric and carbohydrate representations in the labeling and advertising of wines, distilled spirits, and malt beverages are considered to be misleading within the meaning of the applicable regulations unless they provide complete information about the calorie, carbohydrate, protein and fat content of the product").

assertion that such information is now misleading would be not just unpersuasive, but indeed would be entitled to no deference.[22]

2. The opposition that some have expressed to including this information in alcoholic beverage labeling has largely focused on items that are beyond the scope of this White Paper—namely, the inclusion of product ingredients,[23] and any suggestion that there is an equivalence between "standard drinks" of beer, wine, and beverage alcohol.[24] To be sure, some have also suggested that nutritional information should not be permitted on alcoholic beverage labels.[25] But this argument is unsupported by any meaningful explanation of why voluntary nutrition labeling is untruthful or misleading. It certainly is unsupported by any argument how the First Amendment could justify prohibiting the voluntary inclusion of such information on product labels. Instead, these claims tend to rely on *ipse dixit*—such as the unsupported assertion that including nutritional panels on alcoholic beverage labels creates a "[c]lear potential for consumer confusion."[26] But this does not suffice to justify the suppression of speech. In a series of cases involving health claims related to nutritional supplements, the United States District Court for the District of Columbia has held that the government bears the burden of demonstrating that speech is misleading, and that bare assertions of misleadingness are not enough:

---

[22] *See Harco Holdings v. United States*, 977 F.2d 1027, 1035-36 (7th Cir. 1992).

[23] *See, e.g.*, Letter of Dec. 21, 2005 from Robert P. Koch, President & Chief Executive Officer, Wine Institute, to John Manfreda, Administrator, Alcohol & Tobacco Tax & Trade Bureau ("*Wine Institute Comments*"), at 3; Beer Institute Response to Alcohol and Tobacco Tax and Trade Bureau Advance Notice of Proposed Rulemaking ("*Beer Institute Comments*"), at 11-12.

[24] *See Wine Institute Comments*, at 14-15; *cf. supra* figure 3.

[25] *See, e.g., Beer Institute Comments*, at 10-11.

[26] *Id.* at 10.

> The First Amendment does not allow the FDA to simply assert that Plaintiff's Claim is misleading in order to "supplant [its] burden to demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 146 ... (1994) (internal citations omitted).[27]

That court went on to hold, moreover, that in the context of health claims, a total ban on speech is permitted only when there is "almost no qualitative evidence in support of the claim and where the government *provided empirical evidence proving* that the public would still be deceived even if the claim was qualified by a disclaimer."[28] Although the health-claim context differs slightly from this one, the central principle does not: It is the government that must prove that the speech is misleading. That this was true with regard to an agency (FDA) with specialized expertise regarding both labeling and consumer safety indicates that that principle holds true with regard to TTB as well. Here, neither the government nor those who support speech suppression have even attempted to meet this constitutionally imposed burden.

3. It also has been argued that it would be misleading to include on the label the total amount of pure alcohol that a serving contains. In Figure 3 above, for instance, the label shows that a 12-ounce serving of beer contains 0.6 ounces of alcohol. One commenter argues that, "[a]s compared to labeling beverages in terms of their alcohol concentration, or percent alcohol by volume, labeling beverages in ounces of absolute alcohol is misleading because beverage categories, types, and packages vary in alcohol potency."[29] Accordingly, it claims, consumers would have to perform complicated calculations to compare the amount of alcohol in

---

[27] *Whitaker v. Thompson*, 248 F. Supp. 2d at 9.

[28] *Id.* at 11 (emphasis added).

[29] *Beer Institute Comments*, at 16.

two beverages.[30] This is simply false. The very advantage of including the amount of alcohol on a label is that this information avoids the need for complicated calculations. Rather, it provides a common basis for comparing different beverages. In Figures 1, 2, and 3, above, it is readily apparent that one serving of the first two products contains 0.5 ounces of alcohol, whereas the third product contains 0.6 ounces. In short, the objection has it precisely backwards—it is under the existing labeling system that a consumer must perform complicated calculations, multiplying alcoholic concentration by serving size (which does not appear on labels), to determine how much alcohol a drink contains.

Even accepting the argument's factual premise, however, it falls short. First Amendment protections fall away only when a statement is *inherently* misleading.[31] But it is assuredly not inherently misleading to include on a product label the amount of alcohol contained in one serving. At the very most, such a claim could only be said to be *potentially* misleading (although even this is unlikely). And, under such circumstances, the speech may be prohibited only if the information cannot be presented in a non-deceptive manner.[32] (Furthermore, speech that is potentially misleading is subject to the *Central Hudson* test which, for the reasons set forth below, TTB's total prohibition does not satisfy.[33]) There has been no showing that this speech is potentially misleading, only a bare claim to that effect. This is not enough: "If the protections afforded commercial speech are to retain their force, we cannot

---

[30] *Id.* at 16-17.

[31] *Pearson v. Shalala*, 164 F.3d 650, 655 (D.C. Cir. 1999).

[32] *Id.*; *see also Whitaker v. Thompson*, 248 F. Supp. 2d at 9-10.

[33] *Id.*

allow rote invocation of the words 'potentially misleading' to supplant the [government's] burden to 'demonstrate that the harms it recites are real....'"[34]

In all events, the notion that this speech is even potentially misleading—on the theory that mathematical calculations might confuse consumers—runs headlong into the Supreme Court's repeated admonition that a paternalistic refusal to permit consumers access to truthful information is fundamentally inconsistent with the First Amendment:

> [A] State's paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it:
>
> "There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.... But the choice among these alternative approaches is not ours to make or the [legislature]'s. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."[35]

It is patent that the objection to including this factual information on labeling is motivated by rank paternalism, in clear conflict with these basic First Amendment principles.[36] The suggestion that concededly factual information, derived from a simple mathematical calculation, should be kept from consumers lest they be confused by the math, is precisely the sort of paternalism that the First Amendment forbids. "[B]ans against truthful, nonmisleading

---

[34] *Ibanez v. Florida Dep't of Business & Prof'l Regulation*, 512 U.S. 136, 146 (1994); *see also id.* at 143 ("The [government's] burden is not slight.... '[M]ere speculation or conjecture' will not suffice; rather the [government] 'must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'").

[35] *44 Liquormart*, 517 U.S. at 497 (opinion of the Court) (quoting *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)).

[36] *See, e.g., Beer Institute Comments*, at 19 ("Consumers are familiar with and understand percentage measurements."); *see also id.* at 17, 18.

commercial speech ... usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth...."[37]

4. The final potential objection, which falls equally flat, is that the use of a 1.5-ounce serving size for beverage alcohol is somehow misleading, because a consumer may drink more than 1.5 ounces.[38] This argument is thoroughly gainsaid by the consistent use of the 1.5-ounce measure by numerous organs of the government that have responsibility over product labeling and consumer health, including TTB itself. In its 2004 ruling regarding product labeling, TTB itself employed the 1.5-ounce serving size, and did so in no uncertain terms: "[T]his ruling holds that the statement of average analysis *must apply* to a serving of the product, and that the serving *must be* 12 fl. oz. for malt beverages, 5 fl. oz. for wine, and 1.5 fl. oz. for distilled spirits."[39] In fact, TTB has approved a product label (pending final rulemaking on light and carbohydrate representations) that used the 1.5-ounce serving size.[40]

Similarly, the federal Dietary Guidelines issued by the United States Department of Agriculture and the Department of Health and Human Services employ a 1.5-ounce serving size.[41] The National Institute on Alcohol Abuse and Alcoholism of the National Institutes of

---

[37] *44 Liquormart*, 517 U.S. at 503; *see also Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977) ("we view as dubious any justification that is based on the benefits of public ignorance").

[38] *E.g.*, *Beer Institute Comments*, at 32-33.

[39] TTB Ruling 2004-1, at 6 (emphasis added); *accord id.* at 7 ("The Bureau will not sanction any caloric or carbohydrate references on labels or in advertisements that do not contain a statement of average analysis that complies with the requirements of this ruling."), 9.

[40] *See* TTB, COLA Registry, TTB ID No. 04365000000003 (Bacardi Island Breeze), *available at* https://www.ttbonline.gov/colasonline/viewColaDetails.do?action=publicDisplay&ttbid=04365000000003.

[41] United States Dep't of Agriculture (USDA) & United States Dep't of Health and Human Servs., *Dietary Guidelines for Americans* 44 (2005), *available at* http://www.health.gov/dietaryguidelines/dga2005/document/pdf/DGA2005.pdf.

Health does likewise,[42] as do the Centers for Disease Control[43] and the National Highway Transportation Safety Administration.[44] This is not a recent occurrence; the 1.5-ounce serving size has been recognized by these same entities for more than 30 years.[45] Similarly, dozens of states employ this same measure in their state drivers' manuals. Given this widespread use of the 1.5-ounce serving size, the suggestion that its use is somehow misleading rings hollow.

What is more, the notion that the 1.5-ounce serving size is misleading because some may consume more than that, simply blinks at reality. Of course some consumers will consume more than the standard serving, just as some will consume less. This is not surprising. Nor does it undermine the use of a defined serving size. The serving size simply constitutes a benchmark. Consumers are of course free to consume more or less than the benchmark, as they choose. This is just as true of alcohol as it is of a package of cheese or a can of beans. For this reason, were this objection sustained, it would undercut the entire foundation of the FDA-mandated Nutrition Facts panels on food labels, which employ serving sizes as a guidepost to consumers.

---

[42] Nat'l Inst. on Alcohol Abuse & Alcoholism, *Alcohol: What You Don't Know Can Harm You* 1 (2004), *available at* http://pubs.niaaa.nih.gov/publications/WhatUDontKnow_HTML/DontKnow.pdf; *see also* Nat'l Inst. on Alcohol Abuse & Alcoholism, *Alcohol Alert: Alcohol Metabolism* (Jan. 1997), *available at* http://pubs.niaaa.nih.gov/publications/aa35.htm.

[43] Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, Nat'l Ctr. for Chronic Disease Prevention & Health Promotion, *Questions and Answers on Alcohol Consumption*, *available at* http://www.cdc.gov/alcohol/faqs.htm#3.

[44] *See* Nat'l Highway Traffic Safety Admin. (NHTSA), *Alcohol: How Much Is Too Much?* 1, *available at* http://www.nhtsa.dot.gov/people/injury/ems/alcohol_screening/PDFs/Alcohol_How%20Much.pdf; NHTSA, *Sentencing and Dispositions of Youth DUI and Other Alcohol Offenses: A Guide for Judges and Prosecutors*, *available at* http://www.nhtsa.dot.gov/people/injury/alcohol/youthdui/section2.html.

[45] *See, e.g.*, USDA, Handbook No. 456, *Nutritive Value of American Foods in Common Units* tbl. 1, at 30-31 (1975); USDA, Handbook No. 8-14, *Composition of Foods: Beverages—Raw, Processed, Prepared* 42-46 (1986).

For all of these reasons, this claimed objection is not enough to constitutionally justify restricting this speech. Including a 1.5-ounce serving size on a product label is not misleading, either inherently or potentially. This purely factual information simply conveys that 1.5 ounces is the usual amount of the product consumed in a single serving. It provides a basis for measuring the quantity of calories, fat, carbohydrates, and protein in a serving. Without such a serving-size benchmark, it would be impossible to specify nutritional information on the product—which, to be clear, may be what truly drives the supposed objection.

B. THE GOVERNMENT HAS NOT DEMONSTRATED A SUBSTANTIAL INTEREST IN SUPPRESSING THIS SPEECH.

For a speech-suppressive regulation to comport with the First Amendment, *Central Hudson* requires the government to show that it has a "substantial interest" in abridging the speech.[46] Importantly, the government bears the burden of demonstrating the substantial interest.[47] This is as it should be; when the government seeks to supress speech, it is required to explain why it has good reason for so doing.[48]

Here, however, no such interest has been proffered, neither by the government nor by industry groups that oppose including this information on product labels. TTB has offered no reason; it has simply stated that it wants additional information. And the industry groups that are opposed have argued that the information proposed to be included would be misleading. This argument is mistaken, for the reasons set forth above. But, in any event, it does not constitute a "substantial interest" for purposes of *Central Hudson*. Given the absence of any such

---

[46] *See Central Hudson*, 447 U.S. at 566.

[47] *Greater New Orleans Broadcasting*, 527 U.S. at 183.

[48] *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

governmental interest—and the government's utter failure to put one forward—the TTB's refusal to approve labeling containing this information fails *Central Hudson*.[49]

Finally, it bears emphasis that the question at issue is whether the government may constitutionally *forbid* suppliers of alcoholic beverages from including certain information on product labels. The question here is not whether the government should *require* that this information be included. For this reason, it is quite beside the point that there may be reasons that counsel caution in requiring such disclosures. Even if it were true, for instance, that there is no consumer demand for this information,[50] that is only possibly relevant to the question whether the government should mandate a new labeling requirement. But it is quite *ir*relevant to the question whether the government may constitutionally prohibit suppliers from labeling their products in this fashion.

C. THE GOVERNMENT HAS NOT PROVEN THAT THIS POLICY DIRECTLY ADVANCES A GOVERNMENTAL INTEREST, NOR THAT IT IS NARROWLY TAILORED TO ACHIEVE ANY SUCH INTEREST.

As with the requirement that the government must prove that it has a substantial interest in suppressing given speech, TTB also bears the burden of demonstrating that the regulation "directly advances the governmental interest asserted," and that "it is not more extensive than is necessary to serve that interest."[51] This requirement is not a mere formality; the Supreme Court repeatedly has made clear that the government bears a weighty burden to actually "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to

---

[49] *See Ibanez*, 512 U.S. at 146.

[50] *Beer Institute Comments*, at 18.

[51] *Central Hudson*, 447 U.S. at 566; *see also Greater New Orleans Broadcasting*, 527 U.S. at 188 (the government "must demonstrate narrow tailoring of the challenged regulation to the asserted interest"); *Lorillard Tobacco Co.*, 533 U.S. at 565; *Whitaker v. Thompson*, 248 F. Supp. 2d at 14-15 (government bears the burden of showing that suppression "'was a *necessary* as opposed to *merely convenient* means of achieving its interests'").

a material degree."[52] The government may seek to rely upon studies, surveys, and consumer data to demonstrate that the regulation will indeed "directly advance[]" the asserted interest.[53] The courts will scrutinize the evidence put forward by the government to determine whether the restriction actually, directly advances the supposed interest.

Here, the government has failed to articulate any interest. Accordingly, it is impossible to determine whether a government interest is directly advanced by the suppression of this speech, and whether the government's actions are sufficiently tailored. That said, whatever interest TTB (or others) might assert, existing regulation in this area would undermine any claim of a substantial government interest. When the government seeks to advance its assertedly substantial interest through patchwork or inconsistent regulation, such actions are "equivocal" or "irrational," and do not suffice to justify the supression of speech. Thus, in *Greater New Orleans Broadcasting*, the Court held that the federal government's asserted interest in limiting the "social costs associated with 'gambling'" were insufficient to justify speech restrictions, because the federal government elsewhere sanctioned gambling.[54] This infirmity caused the speech restrictions at issue there to fail both the second and third prongs of the *Central Hudson* analysis.[55] In *Rubin*, too—a case, like this one, in which the government limited factual information from being included on alcoholic beverage labels—the Supreme Court looked to the consistency of the federal regulatory scheme. The Court found that the federal laws and regulations were internally inconsistent—one statute prohibited the disclosure of alcohol content on labels (unless required by state law), whereas other authority permitted the

---

[52] *Edenfield*, 507 U.S. at 771.

[53] *See, e.g.*, *Lorillard Tobacco Co.*, 533 U.S. at 557-61; *Whitaker v. Thompson*, 248 F. Supp. 2d at 9-10 (requiring the use of "empirical evidence").

[54] 527 U.S. at 185-87 (referring to the federal policy as "decidedly equivocal").

[55] *Id.*; *see also id.* at 190-91.

disclosure of this information in advertising in much of the country. This represented an "irrational[]" way to advance the asserted governmental interest in preventing alcohol strength wars, and so failed the third prong of the *Central Hudson* test. [56]

The same problem exists here. Since 1979, TTB (or its predecessor, ATF) has *required* beer labels that make claims about calories or carbohydrates (such as "light beer") to specify the calories, carbohydrates, protein, and fat per container or serving.[57] It reasons that the failure to include this information renders the label misleading.[58] In fact, from April 2004 until the issuance of the ANPR in April 2005, TTB also permitted such information to be included on wine and beverage alcohol labels.[59] Furthermore, federal law and regulations currently require suppliers to specify alcoholic content on labels for beverage alcohol and wine containing more than 14% alcohol.[60] Under these circumstances, TTB is hard-pressed to demonstrate that prohibiting labels from listing such straightforward, factual information now serves a substantial government interest at all, much less in a direct and narrowly tailored fashion.

III. PENDING THE OUTCOME OF ITS RULEMAKING PROCESS, TTB MUST PERMIT SUPPLIERS TO INCLUDE SERVING FACTS ON THEIR LABELS.

As noted above, TTB has announced that until it finishes its rulemaking process, it will not approve alcoholic beverage labels that contain serving facts.[61] Because alcoholic beverages may not be bottled or removed from customs custody without an approved label, this

---

[56] *Rubin*, 514 U.S. at 488.

[57] ATF Ruling 80-3; ATF Ruling 79-17.

[58] ATF Ruling 80-3.

[59] TTB Ruling 2004-1, at 1, 5-7.

[60] 27 U.S.C. § 205(e)(2); 27 C.F.R. §§ 4.36(a), 5.32(a)(3), 5.37. Such information is also permitted on beer labels, in conformance with the Supreme Court's decision in *Rubin*, where permitted by state law. *Id.* §§ 7.22(b)(3), 7.71.

[61] 70 Fed. Reg. at 22,282.

amounts to barring the inclusion of such information on product labels. And, because this blanket refusal will last until TTB finishes its rulemaking process, the restraint on this constitutionally protected speech is likely to last for years. The First Amendment forbids this form of restraint. In any event, First Amendment values argue strongly against such an approach. Thus, TTB should exercise its enforcement discretion to authorize labels containing serving facts information pending the completion of its rulemaking.

Although the Supreme Court has left open the question whether traditional prior restraint analysis applies to commercial speech,[62] the Second Circuit has held in a prominent opinion by a leading jurist that commercial speech is indeed protected against prior restraints.[63] Accordingly, the government must demonstrate that the restraint is "'not more extensive than is necessary to serve [the asserted governmental] interest.'"[64] Here, TTB cannot possibly meet that standard. As noted above, TTB has not even asserted a governmental interest—so it assuredly cannot demonstrate that this endless delay is somehow tailored to a governmental interest.

Moreover, even if there were a hypothetical interest in preventing consumers from obtaining this form of truthful, nonmisleading information that appears on most other food and beverage labels, the endless delay announced by the TTB cannot stand. In *Nutritional Health Alliance*, the court upheld a 540-day period for the FDA to review certain health claims as "sufficiently narrowly tailored" to pass First Amendment muster, because it amounts to "a *limited*, but reasonable, time within which the FDA can evaluate the evidence in support of

---

[62] *Central Hudson*, 447 U.S. at 571 n.13.

[63] *Nutritional Health Alliance v. Shalala*, 144 F.3d 220, 227-28 (2d Cir. 1998) (opinion of the court by Calabresi, J.).

[64] *Id.* at 228.

labeling claims."[65] But here, the policy contains no comparable "limit[]"—the First Amendment-protected speech will be suppressed until TTB completes its rulemaking, which in the normal course of events (given that TTB has only recently issued an *Advance* Notice of Proposed Rulemaking, and has not even issued a Notice of Proposed Rulemaking) is likely to be years from now. In fact, the Second Circuit specifically held that an earlier iteration of the FDA's prior-review policy that contained no time limit was unconstitutional: "[T]he absence of a final deadline constituted a prior restraint of unlimited duration, and ... without such a deadline, the preauthorization scheme would not pass constitutional muster."[66] Nor can TTB claim—as FDA legitimately could in *Nutritional Health Alliance*[67]—that this period of delay is necessary to investigate the validity of the health claims. In the first six weeks of 2006, TTB's average time to process a label application was less than one week,[68] so this indefinite delay is unrelated to evaluating proposed product labels. Under such circumstances, the First Amendment plainly requires TTB to continue to process and approve labels, whether or not they contain serving facts.

At an absolute minimum, and in light of this constitutional imperative, TTB should announce that it will exercise its enforcement discretion[69] and that, pending the outcome of its rulemaking process, it will not disapprove a label simply because it sets forth serving size;

---

[65] *Id.* (emphasis added).

[66] *Id.*

[67] *Id.*

[68] *See* Alcohol & Tobacco Tax & Trade Bureau, U.S. Dep't of Treasury, *at* http://www.ttb.gov/index.htm (last visited Feb. 20, 2005) ("Average Processing Time for eApps" is 5 days).

[69] *See generally Heckler v. Chaney*, 470 U.S. 821, 830-32 (1985).

servings per container; and/or the calories, fat, carbohydrates, protein, and volume of pure alcohol contained in one serving.